Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1805

AARON BRAVMAN,

Petitioner,

v.

BASSETT FURNITURE INDUSTRIES, INC. and BASSETT MIRROR COMPANY, INC.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONER'S CROSS PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, filed by Bassett Furniture Industries, Inc. and Bassett Mirror Company, Inc., No. 76-1597) is reported at 552 F.2d 90 (3d Cir. 1977). The District Court did not file an opinion.

QUESTIONS PRESENTED

1. Whether a party which abandoned an issue in the proceedings below should be allowed to raise it again in a petition for writ of certiorari;

2. Whether this Court should review the decision of the Court of Appeals affirming the decision of the District Court that there was not sufficient evidence to support a claim of attempted monopolization where there was no evidence defining the markets, no dangerous probability of success, and no evidence of specific intent to monopolize, on the particular facts of this case.

STATEMENT OF THE CASE

Respondents Bassett Furniture Industries, Inc. and Bassett Mirror Company, Inc. rely upon the facts as stated in the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit in No. 76-1597 (pp. 4-7), incorporated by reference, and the facts found by the Court of Appeals at *Id* (pp. 33a-34a).[1] The Court of Appeals there stated:

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1. Citations to the opinion of the Court of Appeals below refer to the copy of that opinion printed as the appendix to the petition for certiorari filed by Bassett Furniture Industries, Inc. and Bassett Mirror Company, Inc. in No. 76-1597.

"A Section 2 charge of attempt to monopolize requires a finding of 'specific intent' to do so.[40] Such an intent may be inferred from circumstantial evidence.[41] Circumstantial evidence from which such intent may be inferred includes engaging in unlawful conduct,[42] and specific intent to combine or conspire in such conduct.[43]

In his brief on appeal Bravman limits his Section 2 charge to the claim that defendants attempted to monopolize the sale of residential furniture within the territory assigned to him. An attempt to monopolize directed at a specific geographic area falls within §2.[44] We have held above that the jury could have found a conspiracy in violation of Section 1. There is, however, no evidence suggesting a sufficient nexus between the possibly illegal restraint on Bravman's services and the exclusion of other furniture manufacturers from his territory to support a jury finding a specific intent to monopolize furniture sales in that territory."

40. *E.g. United States v. Columbia Steel Co.*, 334 U.S. 495, 532 (1948); *United States v. Griffith*, 334 U.S. 100, 105-07.

41. *See, e.g., Interstate Circuit Inc. v. United States*, 306 U.S. 208, 224-27 (1939); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600 (1914).

42. *See, e.g. United States v. Griffith, supra,* 334 U.S. at 105-09; *United States v. Yellow Cab Co.,* 332 U.S. 218 (1947); *United States v. Crescent Amusement Co.,* 323 U.S. 173 (1944).

43. *United States v. Singer Mfg. Co.,* 374 U.S. 174 (1963); *American Tobacco Co. v. United States,* 328 U.S. 781 (1946).

44. *See, e.g., United States v. Yellow Cab Co.,* 332 U.S. 218, 225 (1947).

ARGUMENT

I.

Petitioner's claim that Bassett Furniture Industries, Inc. and Bassett Mirror Company, Inc. conspired to monopolize some undefined market was abandoned in the proceedings below, and should not be considered at this time.

As the majority of the Court of Appeals expressly found, Bravman limited his Section 2 appeal to the claim that respondents attempted to monopolize the sale of residential furniture within the territory assigned to him (34a).

Now, before this Court, Bravman seeks to raise the question of conspiracy to monopolize which was not pressed before the Third Circuit. As this Court has consistently recognized, it is improper to use certiorari as a means of obtaining initial determination of a question abandoned or not raised below. *See, e.g., California v. Taylor,* 353 U.S. 553, 557 n.2 (1957). The

court below made no holding with respect to conspiracy to monopolize, nor was it required to. There is no decision on that point for this Court to review. Bravman should not be allowed to inject this new issue at this stage of the proceedings.

On the merits, such a conspiracy to monopolize claim is almost frivolous. Without establishing what the market was, Bravman conceded that Bassett Furniture had only a 3% share of it. And the conduct which the Court of Appeals considered possibly illegal in the context of a §1 charge, limiting Bravman's territory and requiring him to work for the respondents exclusively (29a), can in no way be termed "predatory." On its facts, this case falls squarely under the recent decision of this Court in *U.S. Steel Corp. v. Fortner Enterprises, Inc.*, 1977-1 Trade Cases ¶61,294 (U.S. S.Ct. Feb. 22, 1977). As this Court there stated:

> "But 'increasing sales' and 'increasing market share' are normal business goals, not forbidden by §2 without other evidence of an intent to monopolize. The evidence in this case does not bridge the gap between the District Court's findings of intent to increase sales and its legal conclusion of conspiracy to monopolize. Moreover, petitioners did not have a large market share or dominant market position. See n.3 *infra*. No inference of intent to monopolize can be drawn from the fact that a firm with a small market share has engaged in nonpredatory competitive conduct in the hope of increasing sales. " *Id.* at p. 70, 936 n. 1.

That principle covers the present case, and nothing would be served by repeating the rule on the facts of this case.

II.

The decision of the court below that petitioner failed to present any evidence sufficient to support a claim of attempted monopolization was proper, in accord with settled law, and presents no issue justifying review by this Court.

On appeal to the Third Circuit, Bravman alleged that Bassett Furniture and Bassett Mirror attempted to monopolize some market. The phrase "attempt to monopolize" has been repeatedly defined by this Court to mean the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it. *See, e.g., American Tobacco Company v. United States,* 328 U.S. 781, 785 (1946). Under the settled law as set forth by this Court, to make out a charge of attempted monopolization, Bravman had to present evidence establishing the applicable geographic and product markets; *Walker, Inc. v. Food Machinery Corp.,* 382 U.S. 172, 177 (1965).

Bravman presented no evidence as to what the relevant market was, which by itself fully justified the opinion of the Court below that he had not made out an attempt to monopolize case. And even on his own, hypothetical market, Bravman conceded that Bassett had only a 3% share of it.[2] It is

2. Bravman's petition ignores the fact that he conceded that Bassett Furniture had only 3% of the market that he thought was relevant (appellant's appendix in the Court of Appeals p. 459a). Research has not disclosed any case in which a company with such a minuscule market share was found to be capable of attempted monopolization.

untenable to assert, as petitioner does, that a company in a highly competitive business, with 3% of the market (undefined), has created a dangerous probability of monopolizing that market. And there was no evidence that respondents had any power to control price or exclude other manufacturers from any market.

In addition, the cases are uniform in requiring that a specific intent to monopolize be proven.

> "[W]hen that intent [to monopolize] and the consequent dangerous probability exist, this statute [the Sherman Act] like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Lorain Journal Co. v. United States,* 342 U.S. 143, 153 (1951).

> . . . a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt [to monopolize] now charged." *Times-Picayune v. United States,* 345 U.S. 594, 626 (1953).

Accord, Interstate Circuit, Inc. v. United States, 306 U.S. 208, 224-227 (1939). There was no evidence of such specific intent here. Respondents naturally wanted to increase sales and market share, to compete with other manufacturers, but as this Court recently reaffirmed these are normal business goals, not forbidden by §2; *United States Steel Corp. v. Fortner Enterprises, Inc.*, 1977-1 Trade Cases ¶61,294, p. 70,936 n. 1

(U.S. S. Ct. Feb. 22, 1977). To hold otherwise would be to say that the Sherman Act forbids competition.

Besides failing to show the relevant market, the record is totally devoid of any evidence that the restraint on Bravman's services excluded any other furniture manufacturer from any geographic territory.[3] There was no nexus shown between the alleged restraint and any injury to competition.

In light of Bravman's total failure to produce evidence as to what was the relevant geographic or product market, his concession that even based upon his own concept of what the relevant markets might be that Bassett Furniture had only 3% of that market share, and the total lack of evidence of specific intent to monopolize, the Court of Appeals' affirmance of the District Court's holding that there was insufficient evidence for a jury to find an illegal attempt to monopolize was clearly correct, and presents no issues worthy of this Court's review.

III.

The internal dispute within the Ninth Circuit Court of Appeals should not be reviewed by this Court in the context of a decision by the Court of Appeals for the Third Circuit which totally conforms with the ruling decisions of this Court.

Bravman recognizes that as far back as *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905), and continuing in an unbroken line of decisions, this Court has held that a dangerous

3. No testimony of other furniture manufacturers was offered or presented, and Bravman in fact presented no evidence that such furniture manufacturers would have constituted the appropriate product market.

probability of success must be shown in order to make out a charge of attempt to monopolize, *See, e.g., American Tobacco Company v. United States,* 328 U.S. 781, 785 (1946) (quoted by Bravman at Petition p. 8). Bravman then suggests that because the Ninth Circuit Court of Appeals has maintained a running internal dispute as to whether to follow these decisions of this Court, that the instant decision by the Third Circuit which is totally in accord with the rules set forth should be reviewed now. There is no justification for such an approach.

The rule laid down by this Court is clear, and was followed by the court below. It is true that the Ninth Circuit has refused to follow this rule on occasion.[4] But although the question of whether the Ninth Circuit will continue to ignore the decisions of this Court on this point is one which may have intellectual interest, it in no way requires or even suggests that this Court review the present case, decided by the Third Circuit Court of Appeals, which totally follows the applicable decisions of this Court.

Apparently recognizing the weakness of his position on this point, petitioner then suggests that the entire line of cases requiring dangerous probability of success, be scrapped for his benefit. Aside from the dubious merits of petitioner's legal theory, this case is quite an inappropriate vehicle for reconsidering that settled rule of antitrust law. Bravman failed to

4. *See Lessig v. Tidewater Oil Company,* 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964). *But see Cornwell Quality Tools Company v. C.T.S. Company,* 446 F.2d 825 (9th Cir. 1971), *cert. denied,* 404,1049 (1972) (distinguishing and apparently overruling *Lessig*); and *Hallmark Industry v. Reynolds Metals Co.,* 489 F.2d 8 (9th Cir. 1973), *cert. denied,* 417 U.S. 932 (1974) (distinguishing *Cornwell* and reaffirming *Lessig*).

establish the markets, failed to show specific intent, and failed to show any effect on competition, or competitors of the respondents. As the Court of Appeals found, there was no evidence connecting the alleged restraints on Bravman and the exclusion of other manufacturers (33a-34a).

Given petitioner's failings, and the barren state of the record below, a decision of this Court on the dangerous probability issue would be little more than an advisory opinion. No matter what the result, petitioner still will have failed to establish his claim. This Court should not decide such a question of law as petitioner proposes where, as here, it will have no effect on the case.

CONCLUSION

For the foregoing reasons, this Court should deny Bravman's petition for a writ of certiorari.

Respectfully submitted,

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